

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY

IN RE: . Case No. 06-14863  
EDWARD D. FAGAN, .  
Debtor. . 50 Walnut Street  
Newark, New Jersey 07102  
August 14, 2006  
9:54 a.m.

TRANSCRIPT OF MOTION TO STRIKE OR DISMISS  
BEFORE HONORABLE NOVALYN L. WINFIELD  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Levitt & Slafkes, P.C.  
By: BRUCE LEVITT, ESQ.  
76 South Orange Avenue  
Suite 305  
South Orange, NJ 07090

For Petitioning Creditors: Ravin Greenberg, P.C.  
By: CHAD B. FRIEDMAN, ESQ.  
101 Eisenhower Parkway  
Roseland, NJ 07068

For the Trustee: OFFICE OF THE U.S. TRUSTEE  
By: PETER D'AURIA, ESQ.  
Newark, NJ

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1 THE COURT: How about Edward Fagan while I'm waiting  
2 for the other folks?

3 Appearances.

4 MR. LEVITT: Bruce Levitt for the debtor.

5 MR. FRIEDMAN: Chad Friedman from Ravin Greenberg for  
6 the petitioning creditors.

7 MR. D'AURIA: Good morning, Your Honor, Peter D'Auria  
8 from the Office of the United States Trustee.

9 THE COURT: Okay. What's this about 109H?

10 MR. LEVITT: It's all about 109H, Your Honor.

11 Your Honor, if we could start with what we can all  
12 agree on. I think we can all agree that if this was a  
13 voluntary case it would be dismissed.

14 THE COURT: That's true.

15 MR. LEVITT: We can also agree that there's  
16 absolutely nothing in the code creating an exception for the  
17 credit counseling requirement in the context and involuntary,  
18 there's nothing explicit in the code. We can also agree, Your  
19 Honor, that if you take a look at Section 109 and 109(h) and  
20 the language that's cited in opposition to my motion, the first  
21 thing you have to notice that it's in 109. It's not in 301,  
22 it's in Section 109. 301 deals with voluntary cases. If the  
23 language is only supposed to apply to a voluntary case,  
24 Congress should have, could have and would have put it in  
25 Section 301. It's not in there, it's in 109. Congress made

1 clear when they passed this new law whether we agree with it or  
2 not that there's a credit counseling requirement. I'm glad I  
3 don't have to debate whether or not the credit counseling  
4 requirement has any merit or it's good or bad because I  
5 couldn't make that argument. But I do know that Congress, when  
6 they passed this law, put in Section 109 the section that says,  
7 Who may be a debtor.

8 THE COURT: Okay. Well, let's think about this.  
9 There's petitioning creditors desirous of filing an involuntary  
10 petition against an individual, what are they supposed to do?

11 MR. LEVITT: If a debtor can't follow --

12 THE COURT: Coerce him down or her down to a credit  
13 counseling agency, perform the credit counseling for them, get  
14 the certificate and then go file the petition?

15 MR. LEVITT: No, Your Honor, supposed to go to state  
16 court, I guess. I guess that's what Congress wanted.

17 THE COURT: Oh, Congress didn't intend for there to  
18 be an involuntary petitions against individuals?

19 MR. LEVITT: No. Obviously not, Your Honor. I  
20 didn't pass the law. Your Honor, Congress said --

21 THE COURT: What do I do with 303?

22 MR. LEVITT: 303 specifically says you can't be an  
23 involuntary debtor if you can't be a voluntary debtor. This  
24 man cannot be a voluntary debtor. Congress excluded, and it's  
25 not just involuntary cases, Your Honor. Congress excluded from

1 the bankruptcy system, all individuals who fail, refuse or  
2 don't get their credit counseling. Congress isn't saying that  
3 you can't file an involuntary petition against an individual  
4 who might have gotten their credit counseling, and I'll explain  
5 to you how that could have happened, Your Honor. And there are  
6 various scenarios.

7 THE COURT: Like any good law professor, I'm sure you  
8 could pick up a few that would --

9 MR. LEVITT: I'll give you a few, Your Honor. Let's  
10 say the debtor does the credit counseling, files a Chapter 13,  
11 files a Chapter 7 and doesn't submit their schedules --

12 THE COURT: Files a Chapter 11 even.

13 MR. LEVITT: Files a Chapter 11, files a Chapter 13,  
14 it ultimately gets dismissed, it was done within six months,  
15 the involuntary can be filed. No question. Let's say the  
16 individual did the credit counseling and did exactly I think  
17 what Congress probably was hoping and you know, listen to the  
18 credit counseling people, said you know what, this bankruptcy  
19 is really going to screw up my credit so I'm not going to file,  
20 but he's completed the certificate. Creditors don't like that,  
21 creditors really want him in. Well, if he's done that course,  
22 creditors can file the involuntary because the certificate is  
23 there. Your Honor, let's look at the language of 109(h). You  
24 can't take it in a vacuum. 109(h) specifically says in the  
25 first line, subject to paragraphs two and three, there's no

1 exceptions in two and three, and notwithstanding any other  
2 provision in this section. An individual may not be a debtor  
3 under this title unless such individual has. It can't read it  
4 without that first section. If I read this literally, Your  
5 Honor, and I follow the argument that's raised in opposition to  
6 my motion, I would stand here and argue, and I would think it  
7 would be a little ridiculous, but I would stand here and argue  
8 and I am standing here and arguing, that in Section 109(h),  
9 Your Honor, if you follow the argument, involuntary  
10 bankruptcies are written out as individuals. Because 109(h)  
11 says you can't file here if you're an individual, but only the  
12 individual can get the credit counseling. So therefore if I  
13 read 109(h) literally and follow the argument, involuntary  
14 bankruptcies against individuals are out of the bankruptcy code  
15 unless they got that certificate. That's not what Congress  
16 intended. Congress intended to require credit counseling for  
17 every individual that steps in the doors of this court.  
18 Voluntary -- involuntarily doesn't matter. That's what  
19 Congress said. If Congress intended anything different, Your  
20 Honor, Congress would have had to and would have put this  
21 language in Section 301 not 109. You cannot read that second  
22 section dealing with the individual preceding the date of the  
23 filing of the petition without reading the first part of that  
24 sentence which says an individual may not be a debtor under  
25 this title unless such individual has. He can't be a debtor.

1 It's 109, it's not 301. And there are scenarios, Your Honor,  
2 where an individual can be put into bankruptcy involuntarily  
3 after they got certificates, Congress doesn't want this debtor  
4 here. Whether we can debate, whether Congress knew what it was  
5 doing, what the Congress intended, we can't. We have literal  
6 language that we need to apply. There's no legislative history  
7 that deals with this. There's absolutely no case law. We're  
8 here interpreting --

9 THE COURT: There's no reported case law. I have  
10 some sense that this is not the first time --

11 MR. LEVITT: Your Honor, I think Mr. D'Auria would  
12 tell Your Honor that they've been canvassing the country, and  
13 the U.S. Trustee system is not aware of any case where this  
14 issue has been presented. Whether we're here making history  
15 today, Your Honor --

16 THE COURT: Oh, please, I've read about it in  
17 journals. I know it's been presented somewhere. But go on, go  
18 on, go on.

19 MR. LEVITT: Your Honor, I will tell you I've had  
20 academic discussions with people before this case walked into  
21 my office about this issue. But other than the academics, Your  
22 Honor, I'm not aware of any case where this issue has been  
23 addressed. And again, what Your Honor is being asked to do by  
24 both me and my adversaries, is to interpret -- not even to  
25 interpret -- to read the language of the statute and interpret

1 it literally. And again, if you interpret the language  
2 literally in Section 109(h) where it says you can't be an  
3 individual in bankruptcy unless the individual has applied for  
4 this credit counseling before they file, Congress has written  
5 out involuntary bankruptcies as to individuals. We know  
6 Congress didn't intend that. I think probably what happened  
7 was they missed a word or two where it says filed by or against  
8 the individual. But the reality is, Your Honor, you can't read  
9 the quote literally, and uphold the argument. And again, we  
10 can look at 301, we can look at 303, but we can all agree, Your  
11 Honor, that this individual, if I filed this petition for this  
12 individual and there was no credit counseling certificate, the  
13 U.S. Trustee and the Court would be saying to me he's out  
14 because there's no credit counseling certificate. It's no  
15 different because this is an involuntary case.

16 THE COURT: Okay. And I assume -- with respect to  
17 your argument we actually don't know whether this is the proper  
18 venue or not. I assume you would agree were I to deny your  
19 request and dismiss the case that it would be appropriate to  
20 have perhaps a further evidentiary hearing as to whether it  
21 ought to be here or some other venue.

22 MR. LEVITT: And I've agreed to further discovery,  
23 Your Honor. We haven't gotten to that issue. I will note,  
24 Mr. Friedman went to great lengths in his papers to justify the  
25 involuntary, we haven't filed our answer yet. I think those

1 issues are premature. But certainly if Your Honor rules  
2 against me, we are prepared to submit the discovery on that  
3 issue and ultimately --

4 THE COURT: And other issues.

5 MR. LEVITT: And if Your Honor rules against me,  
6 there could end up being a voluntary filing somewhere down the  
7 road. So I think we can put those issues off.

8 THE COURT: Okay. Mr. D'Auria, Mr. Friedman.

9 MR. D'AURIA: Your Honor, following up on a couple of  
10 comments from Mr. Levitt's argument, I am not aware of any  
11 reported or written otherwise decision specifically addressing  
12 the applicability of 109(h) in the context of an involuntary.  
13 It has been discussed, it has been written about and it's been  
14 much bantered about. But I'm not aware of any opinions that  
15 expressly deal with it.

16 I think the issue, Your Honor, is a little bit  
17 simpler than Mr. Levitt makes out and with due respect to his  
18 argument, I don't think he read enough of 109(h). My argument  
19 is, if you continue to read the rest of 109(h), the statute on  
20 its face talks about petitions filed by the individual who is  
21 supposed to get the credit counseling. And I don't think you  
22 can ignore that language by such individuals. If you continue  
23 to read further, the statute gives some hints as to what the  
24 credit counseling is all about and the purposes for a potential  
25 prospective debtor to consider their options. I think those



1 things are important.

2           Before I continue, I'd like to put two things on the  
3 record if I may, Your Honor. We do not address the venue  
4 issues with leave those to the petitioning creditors with the  
5 debtor. And more importantly, if Your Honor gets passed the  
6 argument that I'm going to present, that's presented in our  
7 paper and considers the applicability of 109(h), there is then  
8 an issue as to whether the petition was stricken or dismissed.  
9 And I will admit that bankruptcy courts around the country  
10 differ and they go in both directions. It is our position that  
11 the case should be dismissed. I have a detailed argument  
12 outlined on that if Your Honor feels it's appropriate to hear  
13 it. Please advise and I'll be glad to present it. I don't  
14 believe debtor's counsel's papers take a position one way or  
15 another. It seems like they leave it up to Your Honor.  
16 Suffice it to say that I don't believe we get there today, but  
17 if we do, I would appreciate if I'd have an opportunity for  
18 further argument.

19           But then if I could turn to the statute, Your Honor,  
20 it says an individual may not be a debtor under this title  
21 unless such individual has during the 180 day period preceding  
22 the date of the filing of the petition by such individual  
23 receive certain credit counseling. First, the 180 days is  
24 important. This is an important sidebar, Your Honor, to our  
25 statutory construction arguments because debtor's motion has

1 included with it a certification by Mr. Edward Fagan that  
2 asserts -- it basically deals with the venue issues. But in  
3 two lines in Paragraph 2 it asserts that he has not received  
4 credit counseling in the 60 days. So even if Your Honor was to  
5 get passed my argument and consider the applicability of  
6 109(h), I don't think Your Honor could do it on the facts  
7 before Your Honor today. Certification only addresses 60 days,  
8 the statute requires review of 180. I think the factual record  
9 would have to be augmented. But getting back to the statute,  
10 some of the things that have been bantered about in the  
11 journals and in articles, is that Congress missed something.  
12 Debtor's counsel said that Congress may have missed a word. I  
13 don't think they missed anything. For every ounce of argument  
14 that they missed something, there's a pound of argument that  
15 they got it exactly right. When they said clearly, succinctly  
16 and expressly filing the petition by such individual, they were  
17 talking about voluntary petitions. And new 109(h) on its face  
18 doesn't address nor apply to an involuntary petition.

19 I think this is consistent with some of the other  
20 amendments to the code. Some of the cases, Your Honor, that  
21 grapple with 109(h) and what to do with it in the circumstance  
22 where it's not satisfied look to how it may or may not play  
23 with other sections of the code. And two sections that they  
24 deal with are 362(c)(3) and (4). And in those sections they  
25 talk about cases, they talk about individuals, they talk about

1 cases by or against, by or against such individual. The  
2 drafters that wrote 109(h) were aware arguably of involuntary  
3 petitions. And in 109(h), they dealt with it very cleanly,  
4 very neatly and very clearly by saying the filing of petition  
5 by such individual.

6 We would argue, Your Honor, that the statute is very  
7 clear on its face, you just have to read all of it, and I would  
8 respectfully cite Perrin v. The United States, 44 USC 37 at 42.  
9 "Fundamental canon of statutory construction is that unless  
10 otherwise defined words would be interpreted taking their  
11 ordinary contemporary common meaning." The statute is clear on  
12 its face. Common meaning petition filed by such individual by  
13 the debtor. If we keep reading the statute and consider the  
14 purpose of the statute, towards the end of 109(h) budget and  
15 credit counseling that outline the opportunities for available  
16 credit counseling and assisted such individual in performing a  
17 related budget analysis. I think it's fair to argue that the  
18 purpose of the statute like I said earlier, is to give a debtor  
19 options before they jump into bankruptcy and to educate them as  
20 to what the ramifications of the bankruptcy filing is. Those  
21 are not the purposes of Section 303. And these two purposes do  
22 not necessarily conflict with each other, they're different.  
23 303 is an involuntary petition, creditors seeking to preserve  
24 assets, pursue creditor's rights. 109(h) is designed to take  
25 an individual debtor and require them to consider their options

1 before they go ahead and file bankruptcy. Not necessarily  
2 conflicting. I'd also cite for Your Honor House Report Number  
3 103-31. A legislation's credit --

4 THE COURT: And you're citing this because you think  
5 the language is clear and unambiguous?

6 MR. D'AURIA: I'm citing it to go to the purpose of  
7 the statute, Your Honor. The purpose of the statute in my  
8 opinion, doesn't conflict nor address 303. That's what I'm  
9 citing it for.

10 THE COURT: I mean I would only consider it if it was  
11 ambiguous. Why am I considering this if it's your position  
12 this language is clear and unambiguous?

13 MR. D'AURIA: Only because it helps Your Honor know  
14 that the purpose was to -- you don't have to. Because all you  
15 do is -- I've read it twice, we can read it a third time.

16 THE COURT: No thank you.

17 MR. D'AURIA: But the purpose of citing that was  
18 merely to highlight that the purpose of the statute was to get  
19 debtor's counseling on their options. And the statute didn't  
20 miss anything when it didn't specifically address involuntary  
21 petition.

22 So with that, Your Honor, I conclude with saying all  
23 you have to do is read the entire 109(h) and see it's clear  
24 does not apply to an involuntary petition.

25 THE COURT: Mr. Friedman.

1 MR. FRIEDMAN: Thank you, Your Honor. Our papers  
2 substantially outline our position here. Our position is  
3 similar to that of the U.S. Trustee's which is that the statute  
4 is clear on its face based on a simple reading. I don't see  
5 anything anywhere else in the code, and like other parties  
6 here, I don't see any other cases that deal with the issue, so  
7 we're looking at this from a perspective of a new one. I'm not  
8 going to read the statute here all over again because that's  
9 been done. The only thing that I suppose has not been  
10 addressed is typically just by way of example, typically in an  
11 involuntary petition, when a debtor does not do the things he  
12 is required to do under the code, it does not necessarily mean  
13 that a bankruptcy petition is dismissed. For example, a debtor  
14 who is in an involuntary, if they don't file schedules or state  
15 their financial affairs, that does not warrant dismissal of the  
16 case, what usually happens --

17 THE COURT: Right, trustee can --

18 MR. FRIEDMAN: -- the trustee files it on their  
19 behalf --

20 THE COURT: So here would the trustee take the credit  
21 counseling for the debtor?

22 MR. FRIEDMAN: Well, I don't know, I don't know how  
23 it would play out but I'm addressing the argument that Mr.  
24 Levitt made that a debtor under a voluntary Chapter 7 could not  
25 be a debtor -- anyway, you understand my argument in that the

1 two chapters differ in the obligations of a debtor in an  
2 involuntary versus a voluntary differ as well.

3 Other than that, the venue argument we can address  
4 later if we get over this hump. I think Mr. D'Auria has  
5 addressed everything that we had intended to address. I don't  
6 want to take up the Court's time by going over that again, by  
7 reading the statute over again. So I thank you, Your Honor.

8 THE COURT: No. And I think both parties' position  
9 is clear. And Mr. Levitt, unless you have something to add  
10 that's different from what you originally said, don't bother.

11 MR. LEVITT: Your Honor, I'm not planning on beating  
12 a dead horse. I do want to address though Mr. Friedman's  
13 comments about if this was an involuntary and the debtors  
14 didn't do -- well, that's after you get past the jurisdictional  
15 issue. You've got to have the jurisdiction over the case first  
16 and all of those Chapter 13 cases that I cited dealt with that  
17 issue, how you can't cure this problem later because the Court  
18 doesn't have jurisdiction to start with. And I would submit to  
19 Your Honor that under 109, this debtor cannot be a debtor  
20 because there's no certificate. We don't ever reach those  
21 issues because this Court has no jurisdiction over this case.

22 THE COURT: Okay.

23 MR. FRIEDMAN: That's the end of the involuntary  
24 petition as to individuals.

25 MR. D'AURIA: Your Honor, I would only add that

1 whether 109 is a jurisdictional statute is a whole other can of  
2 words. I don't think Your Honor needs to get there because I  
3 don't think on the face of the statute it addresses involuntary  
4 petition.

5 THE COURT: Okay. Well, I'm not going to open the  
6 can of worms too greatly, but I think in sort of practical  
7 bankruptcy terms, 109 is in fact a jurisdictional statute in  
8 the sense it's sort of that gate opening part of the bankruptcy  
9 code. It's plainly entitled, Who May be a Debtor. And for  
10 example, with regard to 13, it sets certain debt limits and  
11 with regard to other sections, it says what kinds of entities  
12 may be debtors. I think Congress plainly intended these credit  
13 counseling requirements to be part of Section 109 for that  
14 purpose.

15 Having said that, that's about as far as I can go in  
16 determining plainly what Congress meant. I think with all due  
17 respect to the U.S. Trustee's position, I think 109 is true of  
18 many other sections of the new BAP CAPA statute is a good  
19 example of how -- how shall I phrase this? A sufficient lack  
20 of attention to clarity creates opportunities for litigation  
21 that drives up the cost of all manner of cases in bankruptcy  
22 and this is just one such example. I do in fact think 109(h)  
23 is somewhat ambiguous in this regard. I agree with both Mr.  
24 Friedman and Mr. D'Auria that ultimately when you parse through  
25 the statute, the controlling phrase, I think, to focus on, or

1 read as a whole, rather, let me put it this way, using the  
2 entirety of the clauses there in that (h)(1), I think it most  
3 properly understood that they're talking about a petition filed  
4 by an individual, filed by an individual not filed against an  
5 individual. However, I think the statute is somewhat ambiguous  
6 because there is 301 and 303 out there, and the utter lack of  
7 any reference in 109 to either statute, I think creates this in  
8 my view, unnecessary argument as to whether involuntary  
9 debtors, individual -- whether individual debtors can have  
10 involuntary petitions filed against them.

11 I think it's an elementary canon of statutory  
12 construction that when you're looking at a statute you're  
13 looking at the entirety of the statute, statutory section, and  
14 then you place that statutory section within the context of the  
15 larger statute itself. I think when you do that, I think that  
16 supports the notion that petitions against involuntary debtors  
17 do not require involuntary debtors to have credit counseling as  
18 a prerequisite to the cases going forward. I say that in part  
19 because I think again, if you read the section as I just  
20 suggested to you, that you have to focus on the part of the  
21 section that speaks about preceding the date of filing of the  
22 petition by such individual. If you focus on that it makes  
23 sense in connection with Section 303, also if you focus on that  
24 the rest, as Section 109(h) makes sense as Mr. D'Auria pointed  
25 out clearly the focus of the credit counseling requirement is



1 focused on individual debtors who Congress perceived were  
2 precipitously filing bankruptcy petitions. That plainly would  
3 not apply to involuntary petitioners, there's already sanctions  
4 for precipitously filing involuntary petitions, so I think it's  
5 an interesting argument but ultimately a very unpersuasive one.

6 Motion to dismiss denied. You guys are going to have  
7 to knock each other out with a little discovery. You have not  
8 filed an answer. I forgot to look and see when one was due.  
9 It's past due, but --

10 MR. LEVITT: It was extended because of the motion,  
11 Your Honor, under the rule.

12 THE COURT: But I don't even know when it was due in  
13 the first instance. I forgot to look.

14 MR. FRIEDMAN: Mr. Fagan was -- something like that,  
15 so --

16 MR. LEVITT: Your Honor, I don't have the statute in  
17 front of me, but the filing of the motion to dismiss tolled the  
18 time to file the answer. But I can indicate to the Court that  
19 I'll file an answer within 10 days.

20 THE COURT: Indeed. But since you guys -- where I'm  
21 really going is since I understand that with regard to venues  
22 some discovery will be needed. I'm assuming likewise after you  
23 file an answer, there will be some discovery with respect to  
24 the answer filed. So I'm simply suggesting that since this is  
25 going to turn into a contested proceeding, I think perhaps you

1 ought to confer with one another about producing a scheduling  
2 order. Okay?

3 MR. LEVITT: Fine, Your Honor.

4 MR. FRIEDMAN: That's fine, Your Honor. Thank you.

5 THE COURT: Thank you.

6 \* \* \* \* \*

C E R T I F I C A T I O N

I, Johanna LiMato, court approved transcriber,  
certify that the foregoing is a correct transcript to the best  
of my ability from the official electronic sound recording of  
the proceedings in the above-entitled matter.

/s/ Johanna LiMato Date: September 14, 2006  
JOHANNA LiMATO  
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